

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JANET AVILES, JAMIEKA BROWN,)
STEPHANIE JACKSON, and KEL)
SHARPE, on behalf of)
themselves and all others) CIVIL ACTION NO.
similarly situated,) 2:13cv418
)
Plaintiffs,)
)
v.)
)
BAE SYSTEMS NORFOLK SHIP)
REPAIR, INC., and BAE SYSTEMS)
SHIP REPAIR, INC.,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

May 28, 2014

BEFORE: THE HONORABLE TOMMY E. MILLER
United States Magistrate Judge

APPEARANCES:

LAW OFFICES OF JOSHUA FRIEDMAN, P.C.

By: Joshua Friedman
And

EQUAL RIGHTS ADVOCATES

By: Jennifer Reisch
Counsel for the Plaintiffs

PAUL HASTINGS, LLP

By: Carson H. Sullivan
William C. Barker
Stefanee Handon
Counsel for the De-

1 (Hearing commenced at 4:00 p.m.)

2 MS. SULLIVAN: Your Honor, hi. These are the
3 counsel in the Aviles versus BAE case. Thank you for making
4 the time. Probably we should tell you who is on the call.

5 THE COURT: First, let me tell you that Jody
6 Stewart, who is an official court reporter, is here and will
7 be taking all this down. So she'll be happy to prepare a
8 transcript for you at whatever the market will bear or the AO
9 will allow.

10 I also have an extern in here, Clark Bonney, and my
11 law clerk, Alexa Roggenkamp.

12 I have no idea what you are calling about, but I
13 think you're right, except a discovery issue, identify who is
14 calling first. Start with the plaintiffs.

15 MS. REISCH: Good afternoon, Your Honor. This is
16 Jennifer Reisch with Equal Rights Advocates for the
17 plaintiff.

18 MR. FRIEDMAN: And Joshua Friedman, Office of Joshua
19 Friedman for the plaintiffs, Your Honor.

20 MS. SULLIVAN: This is Carson Sullivan for the BAE
21 defendants from Paul Hastings, and Cory Barker is also on the
22 line, and our associate Stefanie Handon.

23 MR. BARKER: Good afternoon, sir.

24 THE COURT: Good afternoon.

25 When you make your presentations, if you would say

1 who's talking so that the court reporter can accurately
2 transcribe.

3 All right. Who is first? I don't know what the
4 motion is about.

5 MS. SULLIVAN: Your Honor, this is Carson Sullivan
6 for defendants, and we are the ones that initiated the call.
7 Both parties e-mailed about it and decided that we would take
8 you up on your offer from our scheduling conference that
9 before formal discovery motions were filed, we would call you
10 to discuss some of the disputes the parties were having. The
11 reason for this call, and I should preface it by saying that
12 I do believe there are substantial discovery disputes.

13 However, the reason for this call, the defendants
14 wanted to make this call, is it's about the plaintiffs'
15 insistence or apparent insistence that we make witnesses
16 available for 30(b)(6) depositions next week.

17 We believe there are major disputes over the scope
18 of discovery, and it's sort of a little bit of a tortured
19 history, but I'll just go through it very briefly and then
20 plaintiff, I'm sure, will also have something to say about
21 it. But early on in the case we noticed the plaintiffs'
22 depositions, and through that process we also indicated our
23 willingness to put our own witnesses up for deposition.
24 There was no discussion of whether they would be 30(b)(6) or
25 regular witnesses, but we did say that we would work

1 cooperatively to schedule these depositions.

2 I think the crux of why we are here is the
3 plaintiffs were operating under some assumption that we
4 definitively agreed to have those depositions take place the
5 week of June 2nd, and that's just not the case.

6 Before, in our discussions, before we got -- we did
7 not receive a 30(b) (6) notice until very late, I think it was
8 May 7th, but that's really not the issue. The real issue is
9 that we served our discovery objections on April 21st, and
10 this is the plaintiffs' first request for productions, and
11 those objections very clearly set out the burden, the time
12 frame arguments that we believe entitle us, you know, not to
13 have to produce everything the plaintiffs have demanded.

14 We produced our responses on May 5th. Since that
15 time, the plaintiffs have also filed or served second
16 requests for production of documents, many of which overlap
17 to a good degree with some of the 30(b) (6) topics they'd like
18 to cover.

19 Our objections to those requests are not even due
20 until next week, and our responses are not due until
21 mid-June, June 16th. Initially, when I realized that the
22 plaintiff -- they have not met and conferred with us over any
23 of our objections. So right now we have set forth our
24 position on time frame and scope and burden, and it's just
25 sort of that's been all there's been. So when the plaintiffs

1 brought up again they wanted to start depositions, I said,
2 look, I don't really think it's fair, until these discovery
3 disputes are borne out, for us to put up a witness and then
4 have to piecemeal bring them back or hold depositions open.
5 Why don't we meet and confer over these document issues, get
6 that resolved and then have the depositions because discovery
7 goes on until September 18th. I don't think there is a
8 pressing need for depositions to occur before these issues
9 are worked out.

10 I think that, and I do sympathize, I think that
11 Ms. Wright has travel restrictions coming up due to a
12 pregnancy, and I sympathize with that. But I don't think
13 that's a reason to press forward with depositions when the
14 plaintiffs have not met and conferred with us over these
15 substantial issues in the case. I can go through them, but
16 that's sort of our position.

17 The plaintiffs have said they are going to send us a
18 meet and confer letter. We haven't gotten one. In a
19 nutshell, one of the biggest disputes is over the time frame
20 of discovery and the burden of going back, as far as the
21 plaintiffs' claim, that we have to. We'd like to brief that
22 up and file a motion, but we really haven't had any
23 substantial meet and confer about it.

24 So I guess the reason for our call is to ask for
25 your assistance. It's the defendant's position that the

1 depositions next week are just too early. We are absolutely
2 going to cooperate, but starting next week, without having
3 conferred and dealt with these discovery issues, it just
4 doesn't make sense.

5 THE COURT: All right. Who will speak on behalf of
6 the plaintiffs?

7 MS. REISCH: This is Jennifer Reisch, Your Honor,
8 and I will speak on behalf of the plaintiffs with respect to
9 what we initiated or agreed to this call to discuss.

10 We are in agreement on one thing in matters that
11 defendants have not complied with our deposition notice,
12 which we served approximately three weeks ago after having
13 some informal discussions about the fact that we would be
14 scheduling -- that we initiated, in order to avoid disputes
15 over the timing of 30(b) (6) depos prior to actually serving
16 the notice. We served the notice, and they indicated that
17 they were, in fact, available the week of June 2nd and June
18 9th.

19 To date, Your Honor, they have refused to comply
20 with the basic requirement of designating for us the
21 individuals and their job titles who will be designated as
22 30(b) (6) witnesses. They have refused to give us dates and
23 are now sort of conflating apples and oranges by saying that
24 we can't take the depositions that we want to take until we
25 have worked out all of the discovery disputes that we have

1 with them with respect to document production.

2 To begin with, we have been diligently complying
3 with our discovery obligations, and, in fact, will be getting
4 them a formal meet and confer letter with respect to the
5 discovery, the request for documents and interrogatories,
6 focusing on the temporal scope issue and other issues today.

7 They did, on the same day that their responses were
8 due, serve us with a proposed protective order which then I
9 had to take the time to review and make some supposed changes
10 to. They are now saying they were going to continue to
11 withhold documents that they concede are responsive and
12 discoverable on the grounds that some of them, they believe,
13 are confidential documents, and we have still not resolved
14 the issue of the definition of confidential that will apply
15 under the stipulated or, hopefully, stipulated protective
16 order.

17 Of course, if we can't resolve that issue, then they
18 will need to bring that to the Court's attention. But with
19 respect to the 30(b)(6) witnesses, all we are asking for is
20 that they designate the witnesses that they are going to
21 designate. They have not even told us the identity of the
22 persons or the exact number of persons that will be
23 designated. They need to designate those people, and they
24 need to identify which topics they are going to be
25 discussing. So that's the first order of business.

1 The issue of which dates we go on, in the deposition
2 notice we asked that they provide us with the names of the
3 individuals that would be designated and the subject matters
4 seven business days in advance to give us adequate time to
5 prepare for the depositions.

6 At this point, Your Honor, it's clear that they
7 haven't done that, and we are far less than seven business
8 days away from June 2nd, so we are not supposing and we are
9 not on the call today to insist that those depositions happen
10 the week of June 2nd. We are simply insisting that they
11 comply with their obligations by actually designating who
12 they are going to designate and telling us the subject
13 matters and giving us dates when they are available.

14 We fully cooperated with their notices of deposition
15 to our clients. Those depositions have all actually
16 occurred. They occurred in Norfolk, and they have completed
17 the depositions. It's three of the four named plaintiffs,
18 and subject to meeting and conferring, plan to take
19 additional time with one of them. We have been fully
20 cooperative with them on that.

21 With respect to the arguments about temporal scope,
22 first of all, the temporal scope in our discovery document
23 request and the temporal scope deposition questions are two
24 different issues. We are entitled to take a deposition and
25 to ask the questions that we believe are relevant, and they

1 are basically asking, insisting that there be some sort of
2 prospective ruling on the temporal scope of questions, which
3 is just not how it works. If they want to instruct the
4 witness not to answer during the course of the deposition,
5 they need to have grounds for doing so. We don't believe
6 there are any grounds for them to do so at this point, and we
7 don't believe it's really possible to get any kind of
8 advisory or prospective ruling on whether or not any given
9 question about the subject matters and the notice is beyond
10 the temporal scope of potentially relevant discovery.

11 We are conferring with them with respect to the time
12 frame for production of documents, and ESI, or electronically
13 stored information, and as I said, we are going to be getting
14 them a meet and confer letter about that today, and we hope
15 that we will be able to reach some compromise with respect to
16 the temporal scope of their document production.

17 But when it comes to depositions, Your Honor, we
18 would like, you know, to just get the designees and get some
19 dates. We will work amongst ourselves to make sure that
20 there is coverage regardless of any one attorney's physical
21 ability to travel.

22 THE COURT: Response.

23 MS. SULLIVAN: Your Honor, this is Carson Sullivan.
24 I will just briefly respond. I'm a little bit shocked
25 because this is the first I'm hearing that they are not

1 insisting on going forward next week because that is why we
2 called. We have been saying that we are happy to work with
3 them on dates for these depositions. I think that
4 Mrs. Reisch said it best. We have not met and conferred over
5 the documents. I am speaking about the documents, and I
6 cannot imagine going forward with 30(b)(6) depositions when
7 there are such major document issues at issue that have not
8 been resolved. We are talking about -- the plaintiffs
9 originally really had no limit on their document request, the
10 timing, and in their notice for deposition they have used the
11 2005 date.

12 Defendants believe that with burden and for other
13 issues that are still pending in our motion to dismiss, we
14 don't believe a temporal scope goes back anywhere past 2011.
15 We have indicated we'd be willing to discuss some
16 pre-liability discovery periods, but even assuming 2010, that
17 is still a huge five-year difference. So none of these
18 things have been resolved.

19 MS. REISCH: Your Honor. Sorry.

20 MS. SULLIVAN: As far as giving them the names, you
21 know, part of the problem is that they are sort of in this --
22 something going on with not being available for telephone
23 calls and their e-mails, but I don't think there is any
24 requirement that we give the names. We've told them we have
25 two to three individuals that are going to cover the topics,

1 and we are willing to talk about longer time periods because
2 our witnesses will cover more than one topic. I usually, as
3 a courteous, do give the names of the depositions, but
4 sitting here today, I thought that we were calling because
5 the plaintiffs were insisting on going forward next week.

6 MS. REISCH: No. I'm sorry, Your Honor. I have to
7 respond to that.

8 THE COURT: Ms. Sullivan.

9 Mrs. Reisch, Ms. Reisch, Ms. Reisch.

10 MS. REISCH: I made it very clear in an e-mail that
11 I sent to Ms. Sullivan that the issue here was the complete
12 failure to comply with our notice which explicitly contains
13 an instruction asking for defendants to identify the
14 individuals to be designated, their job titles, and the
15 subject matters, and states that we would like that
16 information seven business days in advance.

17 Again, counsel is completely conflating and
18 confusing the issues here. She is essentially saying that we
19 don't get to take depos when we want to take them. We have
20 to take them when defendants think it is the right time for
21 us to take them, which is after all discovery disputes, with
22 respect to documents and the ESI, have been resolved, and
23 that's just not the case.

24 They noticed our plaintiffs' depositions very early
25 on before they had received any discovery responses or

1 documents from them. We permitted -- we cooperated. We
2 arranged to have them go forward. They did go forward.
3 During those depositions, they asked our plaintiffs about
4 matters going back as far as the 1970s, years before any of
5 them even started working at BAE.

6 The scope of production of documents is an issue
7 that we are still meeting and conferring on. We actually do
8 have a time period in the request for documents that we
9 believe is, in fact, based in the facts of this case, but we
10 are not here today to talk about that issue, and we don't
11 think it's right for the Court's involvement yet because,
12 again, we still have to meet and confer.

13 The issue here today is we need to get a response to
14 our 30(b) (6) notice, which has been pending with them for
15 three weeks and which we are entitled to get a response to in
16 terms of their actual available dates. I would note that
17 with respect to those dates, there are e-mails going back and
18 forth confirming that we were holding the weeks of June 2nd
19 and June 9th.

20 The idea that we suddenly now are insisting on dates
21 and individuals to be identified as a new thing is really
22 without merit.

23 THE COURT: Ms. Reisch, if you interrupt counsel
24 from the other side again, I'm going to hold you in contempt.

25 MS. REISCH: I apologize, Your Honor.

1 THE COURT: Let the other counsel finish. I don't
2 think she was finished. Then I will give you another shot at
3 discussing this.

4 Ms. Sullivan, I believe you were interrupted. Is
5 there anything else you would like to say?

6 MS. SULLIVAN: Your Honor, I just would like to say
7 that I'm just a little confused as to these things now that
8 they are saying. It is hard to respond to all of them. But
9 we fully intend to cooperate and give dates. I have not
10 looked at it right before this call, but I don't believe they
11 are entitled to the names.

12 We are working on our designees, and I have told
13 them we have two to three, and I'm happy to give them the
14 names and work with them on dates. It's just been one thing
15 after another, and we, in mid-April, before any of the
16 discovery had been dealt with before -- not dealt with, we
17 said that counsel would hold their calendars for those weeks,
18 but we will wait to get your notices and work with you to
19 schedule depositions.

20 I looked back at my e-mails. I cannot speak to
21 specific individuals without knowing the names because we
22 never -- I actually didn't think that they were talking about
23 30(b) (6) depositions this early. With that said, we are
24 willing to cooperate. We are willing to get dates set, but
25 we are -- and Ms. Reisch has said it, they have not met and

1 conferred with us over these significant discovery issues.
2 Once that happens, and if we need to move for a protective
3 order, we will. But we are not insisting on bringing their
4 plaintiffs back, except for the one who we weren't able to
5 finish, for various reasons.

6 What they are saying is we want to take the
7 depositions out of all of our documents, and by the way, we
8 will bring them back after that when we get more when the
9 discovery disputes are resolved, and we just don't think
10 that's fair.

11 MS. REISCH: Mrs. Sullivan, are you finished? I'm
12 sorry. I don't want to interrupt.

13 MS. SULLIVAN: Yes.

14 MS. REISCH: Your Honor, I just want to say with
15 respect to that last comment, that is not true at all. I, in
16 fact, have insisted in several e-mails that we are very well
17 aware of the time, the temporal limitations, the general
18 seven-hour rule that applies to each individual witness. Of
19 course, the seven-hour rule doesn't apply to the 30(b) (6)
20 deposition as a whole.

21 But as I said to Ms. Sullivan, we would not, you
22 know, *a priori* hold -- seek to hold a deposition open
23 indefinitely pending production of documents. We understand
24 that we are supposed to try to finish each designee within
25 seven hours, but, of course, there are means provided for

1 under the rules for good cause if there is some reason to
2 reopen or to continue or get additional time for a deposition
3 because, for example, of the scope of subject matter to be
4 covered by a certain individual witness, then we would seek
5 to meet and confer with them about the additional time
6 needed, and if we couldn't reach agreement, we would move the
7 Court for that relief.

8 But besides reserving our rights to do that, which
9 is only what the rules provide, I have never stated that we
10 were seeking to start the depos now and simply hold them open
11 indefinitely. All we'd like, Your Honor, is for them to give
12 us dates and for them to designate the individuals and let us
13 know not just the names of the people but please let us know
14 which topics those individuals are going to be designated on
15 to ensure that we actually have coverage of the topics in the
16 notice and to allocate our time and preparation time
17 accordingly.

18 That's all we'd like to get from them, you know, out
19 of today's conference.

20 THE COURT: Okay. This is Judge Miller. Rule
21 30(b) (6) says, in pertinent part, "The named organization,"
22 in this case that's the defendants, "must then designate one
23 or more officers, directors, or managing agents, or designate
24 other persons who consent to testify on its behalf; and it
25 may set out the matters on which each person designated will

1 testify." So the rules require that, in response to the
2 subpoena, that the organization must identify the person,
3 and, if it wishes, it may set out the matters on which each
4 person designated will testify. So that's required.

5 What is difficult about this conversation is you've
6 made the phone call, however, you're not able to agree what
7 the purpose of the phone call was or is. So in the future on
8 any phone calls, prior to making the call, I would want
9 counsel who is making the motion to set out precisely what
10 the reason is for the phone call with copy of the letter to
11 the other side, and if you can't agree what the issue is,
12 then not much for me to do.

13 Now, as far as all these issues about timing, scope,
14 et cetera, obviously they will have to be briefed. They
15 cannot be handled over a phone call. I will require the
16 defendants, as best they can, to identify, or to use the
17 language of the rule, "...designate one or more officers,
18 directors, or managing agents, or designate other persons who
19 consent to testify on its behalf." They say that there are
20 two or three people that they may ask to do this. I would
21 direct that the designation be made by June 2nd, that is,
22 supplied to the plaintiffs.

23 Now, as to when the deposition is going to be taken,
24 to some extent it puzzles me that the plaintiffs want to go
25 ahead now, without me knowing much about the issues, to

1 depose these 30 (b) (6) witnesses without waiting for documents
2 to come in, but that's up to them. It's highly unlikely in
3 this court that you'll be able to go back and redepose them.
4 You get one shot, and that's it unless, as you say, there is
5 good cause. I don't think good cause is wanting to depose
6 people before you have appropriate documents to use in the
7 deposition.

8 That's an advisory opinion which will hold no weight
9 at any other time that I may rule on something. So I'm going
10 to require the designation. If in this case the defendant
11 wishes to file a protective order as to the date of the
12 depositions, not a protective order, a protective motion
13 under 26(c), I believe it is, they are free to do so saying
14 it is too early or whatever. You can file a motion to compel
15 on the part of the plaintiffs. That is as far as I'm going.
16 I'm going to have them tell who the name of the person is and
17 designate as far as the issues. They don't have to say what
18 the person is going to testify to but the issues that are
19 contained in the deposition subpoena or notice of deposition.

20 So my ruling is just on a minor issue because all
21 the others are in need of a meet and confer. Any question?

22 MR. BARKER: Your Honor, this is Cory Barker for the
23 defendants. I just have a quick question for you to make
24 sure we are on the same page and I understand everything. We
25 will make our designation as directed. Will we have the

1 opportunity, for example, if we work through this, if we
2 identify that there are additional individuals who may need
3 to testify at a particular point to satisfy some particular
4 issue, like a 20-page notice here, will we have the
5 opportunity to do that?

6 I just don't want to face the situation where
7 plaintiffs assert in the future that we had to designate
8 everybody by June 2nd, if we don't, then we are waiving some
9 rights or we are limited in some way to identify additional
10 witnesses if it's necessary to do so?

11 THE COURT: Under the rules you have the right to
12 supplement discovery if you find an issue comes up that you
13 thought a witness had knowledge about but it turns out
14 somebody has more knowledge, we'll take that up when it
15 comes.

16 MR. BARKER: Thank you, sir.

17 MR. FRIEDMAN: Your Honor, this is -- I apologize.
18 I didn't mean to interrupt.

19 THE COURT: Go ahead.

20 MR. FRIEDMAN: Your Honor, this is Joshua Freedman.
21 I just have a clarification question. Without defendants
22 making a protective order or the plaintiffs making a motion
23 to compel these depositions, and without an agreement as to
24 date, it could be that we just go forward at this point
25 without being able to take the depositions. I wanted to ask

1 if perhaps your instructions could include the defendants to
2 provide available dates for the people whom they are making,
3 people whom they are telling us are going to testify, with
4 the understanding that the plaintiffs will confer with them
5 and serve notices of deposition based on that availability so
6 that, assuming that we don't have any further problems, using
7 the instructions the Court has already given, we can
8 basically get the show on the road?

9 THE COURT: Ms. Sullivan, that sounds reasonable to
10 me.

11 MS. SULLIVAN: It does sound reasonable but for the
12 major discovery dispute that I suspect we will be moving for
13 a protective order on. As you said, Judge, I'm a little
14 concerned. I mean, to your point, if they want to go forward
15 with the document issues not being resolved, that will be
16 okay with us. I just -- I don't want my witnesses to be
17 under some -- let's just say the motion, our protective order
18 is ruled upon in our favor, then it's no trouble. But if we
19 lose and then the plaintiffs say, oh, well, you've got to
20 come back and all these documents weren't produced, it just
21 seems that we should wait until that is resolved.

22 But we will file a motion on that, and we are happy
23 to go ahead and start getting available dates.

24 THE COURT: All right. Then provide the available
25 dates by June 2nd for each of the designated witnesses as

1 30 (b) (6) witnesses. You should have plenty of time to do
2 that. Anything else?

3 MS. SULLIVAN: Thank you, Your Honor.

4 MS. REISCH: Thank you, Your Honor.

5 THE COURT: Well, I await your motions for
6 protection and also your motions to compel. I'm sure they
7 will be interesting.

8 All right.

9 MR. BARKER: We will do our best.

10 THE COURT: I will enter an order, and Ms. Stewart
11 can type up the transcript if you want her to. Let me let
12 her give you her phone number.

13 (Reporter gives telephone number.)

14 THE COURT: Of course, that is area code 757. She
15 lives in the same area code I do.

16 All right. Thank you. Bye.

17 (Hearing adjourned at 4:28 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

X _____ / s / _____ X

Jody A. Stewart

Date